Applications for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- and by -

Leticia Macaranas Sarmiento
("Ms. Sarmiento")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL PANEL:	David B. Stevenson, Panel Chair Brent Mullin, Chair Carol L. Roberts, Member
FILE Nos.:	2013A/43 and 2013A/44
DATE OF DECISION:	October 22, 2013

DECISION

SUBMISSIONS

Michelle Alman	counsel for the Director of Employment Standards
Ai Li Lim	counsel for Leticia Macaranas Sarmiento
Robert W. Richardson	counsel for Yiu-Kwan (Franco) Orr and Oi-Ling (Nicole) Huen

OVERVIEW

1. The Director of Employment Standards (the "Director") and Leticia Macaranas Sarmiento ("Ms. Sarmiento") seek reconsideration under section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D049/13, dated June 19, 2013 (the "original decision").

2. The original decision considered an appeal of a Determination issued by a delegate of the Director (the "delegate") on November 23, 2012.

3. The Determination was made on a wage claim filed by Ms. Sarmiento who alleged Yiu-Kwan (Franco) Orr ("Mr. Orr") and Oi-Ling (Nicole) Huen ("Ms. Huen") had contravened the *Act* by failing to pay regular wages, overtime pay, statutory holiday pay, annual vacation pay and length of service compensation.

4. The delegate found Mr. Orr and Ms. Huen had contravened Part 3, sections 17 and 18, Part 4, section 40, Part 5, section 45, Part 7, section 58 and Part 8, section 63 and ordered Mr. Orr and Ms. Huen to pay Ms. Sarmiento $30,662.90, an amount that included both wages and interest under section 88 of the *Act*.

5. The delegate also imposed administrative penalties on Mr. Orr and Ms. Huen under Section 29(1) of the *Employment Standards Regulation* (the *"Regulation"*) in the amount of $3,500.00.

6. The original decision cancelled the Determination and referred Ms. Sarmiento's wage claim back to the Director for an oral hearing before a different delegate.

ISSUE

7. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issues raised in these applications is whether the Tribunal should grant the request to reconsider the original decision and either vary the decision, as argued by the Director, or confirm the Determination, as argued by Ms. Sarmiento.

ARGUMENT

8. As indicated, the Tribunal has received two applications for reconsideration of the original decision: one from the Director and one from Ms. Sarmiento.

9. The Tribunal has received submissions on the applications from each of the applicants, responses to each application from Mr. Orr and Ms. Huen, and a final response on their application from each applicant. We shall separately summarize the position and arguments made by the parties on each application.

10. Before doing so, we shall address an objection that has been raised by Mr. Orr and Ms. Huen in an unsolicited submission dated September 24, 2013, filed by their legal counsel after the completion of submissions on the reconsideration applications. The submission challenges the jurisdiction of the Tribunal over the application for reconsideration filed by the Director.

11. The submission says the Tribunal does not have jurisdiction to hear two reconsideration applications of the original decision. Counsel argues that section 116 of the *Act* clearly prohibits multiple reconsideration applications of the same order or decision and, as the Director's reconsideration application followed Ms. Sarmiento's reconsideration application in time, it should be dismissed as it, "was not permissible under the Act, and is void".

12. While this submission is unsolicited and untimely, we are not prepared to dismiss it on those bases. The submission raises a jurisdictional question that we have decided should be addressed on its merits.

13. We have not sought any response to the submission from the other parties as we are satisfied it can be addressed without hearing from them.

The Objection to the Director's Application

14. Section 116 of the *Act* has been reproduced in full below, but for ease of reference, we will set out subsections 116(2) and 116(3) here:

> *116 (2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

15. Counsel's submissions flow from the following two arguments relating to the wording of subsections 116(2) and (3): first, subsection 116(2) is written with a disjunctive "or"; and second, a disjunctive interpretation is supported by a prohibition against multiple applications in subsection 116(3).

16. We do not agree with either argument.

17. It is trite that the use of "or" in statutory language can be either disjunctive or conjunctive in meaning. Its meaning can thus be either exclusive or inclusive: see Ruth Sullivan, *Construction of Statutes* (5th ed., 2008), pp. 81-84. The interpretation of the use of "or" in a statute is to be done contextually, consistent with what is referred to as the Driedger modern principle of construction of statutory language: *ibid.*, pp. 1-21.

18. Driedger's modern principle has been consistently endorsed and adopted by the Supreme Court of Canada, as set out in the following summary in *Michael Nicholas Hills carrying on business as Summerland Taxi,* BC EST # RD094/11 (Reconsideration of BC EST # D024/11), paras. 33 and 34:

> This case turns on a question of statutory interpretation. Employment standards legislation must be given large and liberal interpretation consistent with its remedial nature (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). However, statutory provisions must not be stretched beyond reasonable limits. In *Bell ExpressVu*

Limited Partnership v. Rex, [2002] 2 S.C.R. 559, the Supreme Court of Canada set out, in some detail, the principles governing statutory interpretation (see paras. 26 *et seq*.). If a statutory provision is clear and unambiguous, in the sense that the provision is not reasonably capable of being interpreted in more than one way in light of the overall scheme and purpose of the legislation, the provision must be interpreted in its grammatical and ordinary sense. In *Rizzo*, the Supreme Court of Canada reiterated two important principles of statutory interpretation. The first principle is that above-referenced rule that statutory provisions must be read in their entire context in their "grammatical and ordinary sense". This rule, taken from Elmer Driedger, *Construction of Statutes* (2nd ed., 1983) at page 87, has been repeatedly endorsed by the Supreme Court of Canada as representing the "preferred approach" to statutory interpretation and it recognizes that the words of a statute must be placed within a broader context that includes the nature and purpose of the legislation in question (*Rizzo*, para. 21; *Bell ExpressVu*, para. 26):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The second principle concerns the avoidance of absurd results (*Rizzo*, para. 27):

> … It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Côté*, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

19. Applying these principles, "or" in subsection 116(2) of the *Act* is clearly used in the conjunctive, inclusive sense, not the disjunctive, exclusive sense argued in the submission. Interpreting "or" in a disjunctive and exclusive sense in subsection 116(2) would, viewed in the broader context and overall nature and purpose of the *Act*, be inequitable, illogical, and unreasonable. It would be unfair, in a matter where there is the potential for more than one party to file a reconsideration application, to interpret "or" in a way that would bar one or more parties from seeking reconsideration of the original decision. It raises the spectre of one party "hijacking" the reconsideration process by quickly filing for reconsideration and in that way limiting the issues that can be considered in that process.

20. In the present case, Mr. Orr and Ms. Huen submit reconsideration should, in effect, be on the basis of first come, first and first only served. In our view, such a view of section 116 is unfair, inappropriate and inconsistent with the overall thrust of the *Act* which includes treating parties fairly and giving the *Act* the fair, large, and liberal interpretation advocated by the Supreme Court of Canada in the decisions referred to above.

21. We are satisfied the legislature did not intend to restrict the Tribunal's section 116 power of reconsideration to only the first application that is received.

22. To the extent Mr. Orr and Ms. Huen rely on the language of section 116(3) in support of their proposed interpretation, we find, on a purposive reading of section 116(3) in the context of the *Act* as a whole, that subsection 116(3) was intended to limit the number of applications a party or the Director may make with respect to the same order or decision. It was not intended to deprive an affected party of the ability to seek

reconsideration of a Tribunal decision merely because the Director or another affected party has, as it were, "beaten it to the punch" by filing its application sooner.

23. In result, we reject the submission that the Tribunal does not have jurisdiction to consider the two reconsideration applications in the present matter.

The Director's Application

24. The Director submits there are two serious errors of law in the original decision: the first arising in the order requiring an oral hearing on Ms. Sarmiento's complaint; and the second arising from the implication that the parties to a complaint must be given notice, and an opportunity to be heard, when the Director, or one of the delegates, makes a decision to change the complaint resolution mechanism.

25. In respect of the first error alleged, the Director argues section 76(3) of the *Act* provides the Director with the statutory authority and discretion to "mediate, investigate and adjudicate a complaint" and the Tribunal's authority under section 115 does not, either expressly or by necessary implication, include the ability to dictate how that discretion must be exercised if a Determination is cancelled and referred back.

26. The Director acknowledges the Tribunal has authority to give directions as to the re-hearing of matters remitted back – see *Director of Employment Standards and Old Dutch Foods Ltd.*, BC EST # RD115/09 – but says the original decision went beyond what was necessary to "ensure that the error for which the matter is being remitted is not repeated or is cured".

27. The Director notes the Tribunal has indicated procedural fairness under the *Act* does not require oral hearings be held and that credibility issues have frequently been resolved through procedures that do not include oral hearings.

28. The Director submits imposing a requirement for an oral hearing is inconsistent with the stated purpose of fairness and efficiency in resolving disputes found in section 2(d) as it could lead to the necessity for oral hearings even though another complaint resolution process is more appropriate.

29. The Director argues the decision to order an oral hearing in this case ignored the totality of the evidence in the section 112(5) "record", particularly that evidence showing Mr. Orr and Ms. Huen were subject to bail conditions, issued in a separate but parallel criminal proceeding, ordering they have no contact, directly or indirectly, with Ms. Sarmiento.

30. In respect of the second error alleged, the Director argues the implication in the original decision that the delegate's decision to change the complaint resolution mechanism required notice to the parties and an opportunity to be heard on that change was contrary to the purpose set out in section 2(d), inconsistent with the accepted principle that fairness requirements in administrative law are variable and ignored the scope of authority given to the Director in section 76(3).

31. The Director submits the process selected for the resolution of a complaint under the *Act* creates no substantive right to that particular process or any legitimate expectation that such process will not be changed at the discretion of the Director without notice; it is argued that such a conclusion would unnecessarily and unduly delay the complaint process and the ability of the Director to respond to circumstances requiring a change to the complaint resolution procedure.

32. The Director says it is appropriate for the Tribunal to exercise its authority to reconsider and to vary the original decision by removing the order that an oral hearing must be held and by clarifying that the Director need not give notice or an opportunity to be heard before deciding to change the complaint resolution process.

33. Ms. Sarmiento agrees with the submissions made in the Director's application, but submits the errors in the original decision are sufficiently significant to color the entire decision, requiring it to be cancelled and the Determination re-instated and confirmed. Alternatively, Ms. Sarmiento agrees with the disposition argued by the Director.

34. Mr. Orr and Ms. Huen oppose the application and submit the original decision was properly founded and should not be disturbed.

35. Mr. Orr and Ms. Huen say the original decision was justified based on the fundamental errors made in the Determination that included: accepting an evidentiary record supporting Ms. Sarmiento's claim that was entirely hearsay; deciding credibility in the absence of oral testimony from Ms. Sarmiento; and the delegate acting as an advocate for Ms. Sarmiento.

36. They submit recent events reinforce their contention that the delegate, and the Director, are continuing to advocate on behalf of Ms. Sarmiento.

37. Mr. Orr and Ms. Huen submit the original decision was also justified on public policy and justice considerations. They say the "parade of horribles" argued by the Director is not persuasive as the errors made in the Determination, and accepted in the original decision as a basis for cancelling it and ordering the matter be referred back for oral hearing, can be easily rectified by ensuring those errors are not repeated in future cases.

38. In reply to the response filed for Mr. Orr and Ms. Huen, the Director notes the apparent failure of that response to recognize the relief sought in the application seeks to have the original decision varied to remove the order for an oral hearing.

39. The Director disagrees with the contention that, in the context of complaint proceedings under the *Act*, credibility "cannot be determined in the absence of the litigant" and notes the Tribunal has consistently upheld findings of credibility made without an oral hearing.

40. The Director says the suggestion that recent events show a continued advocacy on behalf of Ms. Sarmiento is incorrect; the delegate has not been involved in instructing on the reconsideration process. The Director's actions simply recognize the comments in the original decision that:

> The delegate conducting the new hearing should take cognizance of the Supreme Court of Canada's decision *Toronto (City) v. C.U.P.E, Local 79*, [2003] S.C.R. 77 . . . to the extent that the appellants' ongoing criminal trial results in facts being determined that might impact the outcome of the complaint hearing.

41. Accordingly, says the Director, unless the application is successful, a delegate conducting the complaint hearing will need to be aware of express or implicit findings of fact made in the criminal proceedings involving Mr. Orr and Ms. Huen. Acquiring the criminal trial transcripts is no more than fact gathering in order to assist a new delegate in reasonably limiting the scope of factual inquiry for the complaint. It is a matter of legal correctness and efficiency.

Ms. Sarmiento's Application

42. Ms. Sarmiento's application differs little in substance from that of the Director.

43. Ms. Sarmiento says the Tribunal Member of the original decision erred in law by failing to appreciate the relevance and importance of the "no contact" order in the decision of the delegate not to hold an oral hearing on her complaint, and submits this aspect of the original decision undermines the integrity of court ordered protective mechanisms.

44. Ms. Sarmiento also asserts the Tribunal Member of the original decision erred in construing the nature of the evidence submitted on her behalf and by ordering an oral hearing.

45. On the first argument above, it is submitted there was an ample body of evidence from which Ms. Sarmiento's credibility could be assessed, including affidavit and documentary evidence supporting the statements made on her behalf by counsel. Ms. Sarmiento says the Tribunal Member of the original decision erred by failing to look at the evidence as a whole and assessing the entire the body of evidence before deciding the evidence in the record did not allow for a finding of relative credibility.

46. The second argument echoes the position of the Director, submitting the order requiring an oral hearing inappropriately usurped the discretion of the Director to decide how best to deal with a complaint.

47. Ms. Sarmiento seeks to have the original decision cancelled and the Determination upheld.

48. The Director agrees with and supports the application of Ms. Sarmiento, including the resulting order sought in her application.

49. Mr. Orr and Ms. Huen oppose the application for the same reasons as submitted in the response to the Director's application.

50. Mr. Orr and Ms. Huen add that the argument addressing the sufficiency of the evidence makes no meaningful argument why the original decision was incorrect, but merely reiterates what is in the record.

51. Mr. Orr and Ms. Huen also say the submission that hearsay statements and argument made through legal counsel can stand as evidence misunderstands the evidentiary process, the separation of counsel and client and the inability to test such "evidence" by cross-examination.

52. In final reply, Ms. Sarmiento objects to several aspects of Mr. Orr and Ms. Huen's reply, saying it fails to address the fact that other evidence, documentary and affidavit, was provided to the delegate, that it inappropriately personalizes arguments and mischaracterizes the facts.

ANALYSIS

53. Section 116 of the *Act* states:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

54. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion, grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

55. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

56. The Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

57. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

58. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

59. Having reviewed the original decision, the material in the appeal file and the submission of the parties on the reconsideration applications, we are of the view these applications warrant reconsideration.

60. Specifically, we find these applications raise an important issue concerning the degree of deference that ought to be accorded to the statutory authority and discretion of the Director over the complaint process.

61. But for that issue, these applications would have been denied.

62. We agree that the Director, and, by extension, her delegates, have a discretion to decide the process by which a complaint will be determined. That is the effect of section 76 of the *Act*.

63. The Tribunal's authority over an exercise of discretion by the Director is limited: see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98.

64. The discretionary authority of the Director to decide how complaints should be processed cannot be interfered with or ordered by the Tribunal unless the process selected by the Director is found to contravene a legal principle. The circumstances in which such an order could be justified would be exceptional and would require the Tribunal to provide a clear articulation of the reasons for such an order: see *Director of Employment Standards* (*Re Ningfei Zhang*), BC EST # RD635/01, and *Director of Employment Standards and Old Dutch Foods Ltd.* BC EST # RD115/09. That order should also "... not give more direction than is necessary to ensure that the error for which the matter is being remitted is not repeated or is cured" (*Old Dutch*, para. 75). We note as well that both the original panel and the reconsideration panel in *Old Dutch* were, in the disposition in that case, respectful of "... the discretion of the Director as to how to proceed under the *Act*" (ibid., para. 77).

65. It is well established that there is no absolute right to an oral hearing, whether before a delegate of the Director or before the Tribunal: see *D. Hall & Associates Ltd. v. Director of Employment Standards and others*, 2001 BCSC 575 and *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03. This principle applies whether or not the complaint involves issues of credibility. The Tribunal has not adopted a principle that requires credibility issues to be decided only through an oral hearing.

66. The appropriate way to address concerns arising from the failure to hold an oral hearing is through the Tribunal's supervising authority to ensure compliance with section 77 of the *Act* and with principles of natural justice in making the Determination, as the Tribunal Member of the original decision did in considering the appeal of the Determination.

67. Also, the authority of the Tribunal over the exercise of discretion in selecting the process for administering a complaint, while limited, does allow the Tribunal to have regard to the reasons for selecting one form of complaint process over another. It is trite that the matter in issue can drive the process chosen and, in turn, compel a more critical analysis of the reasons for choosing one process over another, but each case will turn on its own facts.

68. The Tribunal should not, however, presume that any particular form of complaint mechanism process will automatically result in a denial of a fair hearing.

69. The possibility that some Determinations might not pass muster on natural justice grounds, does not justify avoiding the statutory direction provided by section 76 that grants the Director the discretion to decide the complaint resolution process.

70. In sum, based on the above considerations, we make the following findings.

71. First, the delegate did not err in deciding not to hold an oral hearing in this case. In our view, the terms of the bail recognizance and Mr. Orr's email to the Delegate dated July 12, 2011, were unequivocal. The "no contact" order in the bail recognizance did not include an exception for contact in civil proceedings, as was presumed in the original decision. The issuance of the bail recognizance was followed by the email in which Mr. Orr said:

> Today (July 12), I attended the Bail office to report under the BAIL CONDITION set out by the [p]residing judge who dealt with my criminal matter. I have advised the Bail Supervisor that a hearing was scheduled for tomorrow July 13, 2011 at the Employment Standard Board and their opinion was that I should not and cannot attend because our bail conditions imposed on us stated clearly that [we] cannot have direct or indirect[ly] contact with the complainant namely Ms. Sarmiento Leticia. If the Provincial court finds out that I have contacted with Ms. Sarmiento, to put it blunty [sic], our liberty will be at stake. The Bail office have advised us that we should attend your office [a] few hours before the meeting and hand to you with [sic] a letter explaining our situation and that's [what] we are doing now.

72. Second, we do not accept there was a finding in the original decision to the effect the delegate should have sought submissions from the parties before converting the complaint resolution process from an adjudication to an investigation. The Director's submission correctly notes it is merely noted in the original decision that submissions were not sought on this point. What follows in the original decision is an examination of the impact of the terms of the bail recognizance on the proceedings, which we have just considered.

73. Accordingly, we need not answer the arguments made by the Director, but will note that whether submissions must be sought at a particular juncture in a proceeding is a question of procedural fairness or natural justice which must be determined contextually in the particular circumstances of the case.

74. Third, we agree, for the reasons provided in paragraphs 25 and 29 of the original decision, that the Determination must be cancelled, the matter referred back to the Director and assigned to a different delegate. Even accepting credibility can be decided without an oral hearing, the manner in which that was done in the Determination cannot be supported given the deficiencies outlined in paragraphs 25 and 29 of the original decision.

75. Fourth, in making the above finding, we do not agree with the submission of Ms. Sarmiento that other evidence filed by her was sufficient to overcome these deficiencies.

76. Fifth, we do not agree that the Tribunal Member, in the circumstances of the case, should have ordered an oral hearing and we vary the original decision to remove that order. In its place, and consistent with the Tribunal's approach in the *Old Dutch Foods Ltd.* reconsideration, *supra*, we recommend that the Director give thorough consideration to the concerns raised in the original decision and ensure the error for which the matter has been remitted "is not repeated or is cured".

ORDER

77. Pursuant to section 116 of the *Act*, we order the original decision be varied to remove the order for an oral hearing and be confirmed in all other respects.

David B. Stevenson, Panel Chair
Employment Standards Tribunal

Brent Mullin, Chair
Employment Standards Tribunal

Carol L. Roberts, Member
Employment Standards Tribunal